No. 15-35

In the Supreme Court of the United States

HOUSTON BAPTIST UNIVERSITY,
EAST TEXAS BAPTIST UNIVERSITY, AND
WESTMINSTER THEOLOGICAL SEMINARY, PETITIONERS

v.

SYLVIA MATHEWS BURWELL,
SECRETARY OF HEALTH & HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF

Notwithstanding HHS's obstinate efforts to contend otherwise, this case is not about whether religious nonprofits have a right to prevent their employees from receiving cost-free contraceptive coverage from third parties. Petitioners assert no such right, and they would not object to HHS making such arrangements with third parties, if only HHS did not force petitioners themselves to take actions that HHS deems necessary to achieve its ends and put petitioners into compliance with its contraceptive mandate. How HHS can simultaneously claim that the affirmative actions it compels from petitioners are essential to accomplishing its compelling interest in providing cost-free contraception and yet insufficient to make petitioners complicit in providing that coverage is mystifying. But ultimately neither HHS nor Article III courts are the proper arbiters of how much complicity is too much. That is a decision that rests with the religious adherent, as an entire line of this Court's cases makes clear.

HHS emphasizes the unanimity of the circuits in finding no substantial burden, but that ignores the numerous judges, including Judge Rosenthal below and no fewer than five judges on the Tenth Circuit, who have reached contrary judgments. Indeed, the Tenth Circuit judges in the *Little Sisters* case not only rejected the panel majority's reasoning, but confidently predicted that the decision would not long survive. That confidence stems from the clarity with which this Court's precedents speak to the question presented. The contraceptive mandate here is the exact same mandate this Court found to substantially burden religious exercise in *Burwell* v. *Hobby Lobby Stores, Inc.*,

134 S. Ct. 2751 (2014). And despite HHS's rhetoric about "opt-outs," petitioners are no more exempted from or allowed to opt out of that mandate than Hobby Lobby was. They are simply given another option to take affirmative steps that HHS deems necessary to accomplish its desired ends and sufficient for petitioners to satisfy its mandate. Whether that alternative means of compliance makes all the difference is the question that the Courts of Appeals have elided by mistakenly dissecting petitioners' religious beliefs and concluding that there is no substantial burden.

Finally, despite HHS's contrary suggestion, this case is an ideal vehicle for considering these surpassingly important issues. While the Fifth Circuit reached only the substantial burden issue, the District Court reached and rejected HHS's arguments on every relevant issue in entering a permanent injunction against HHS. The record and arguments on appeal thus were fully developed on every issue, and there is no obstacle to HHS raising alternative grounds to defend the Fifth Circuit's mistaken judgment. Likewise, the question presented is broadly framed to enable this Court to resolve all of the issues or to remand for the Court of Appeals to grapple meaningfully with the compelling interest/least restrictive means analysis. But in the end, what matters is not which petition(s) this Court grants, but that the Court intervene now to vindicate Congress's judgment in RFRA before religious organizations are forced to comply with HHS's mandate.

I. The exceptionally important question presented warrants this Court's review.

HHS does not dispute the exceptional importance of the question presented. Nor can it, as thousands of religious nonprofits nationwide are being forced to choose between taking actions that they sincerely believe violate their religious beliefs and paying draconian fines. And for many employers, this Court is now the end of the road. Unless the Court agrees to review the legality of HHS's novel regulatory mechanism for compliance with its contraceptive mandate, they will face the precise dilemma RFRA seeks to eliminate: choosing between violating their religious beliefs and violating the law. As this Court has recognized three times in granting extraordinary relief to employers facing that impossible choice, the stakes are simply too high to allow HHS to force religious organizations to yield before this Court addresses the grave doubts concerning the validity of HHS's insistence.

HHS's emphasis on the concurrence among the circuits ignores both what is at stake and the many impassioned dissents and District Court decisions rejecting HHS's arguments, see Pet.26-27—not to mention the scores of amici supporting this petition and other pending petitions. Five Tenth Circuit judges have joined that chorus since the petition: "All the plaintiffs in this case sincerely believe that they will be violating God's law if they execute the documents required by the government. And the penalty for refusal to execute the documents may be in the millions of dollars. How can it be any clearer that the law substantially burdens the plaintiffs' free exercise of religion?" *Little Sisters of the Poor Home for the Aged* v. *Burwell*, 2015 WL

5166807, at *1 (10th Cir. Sept. 3, 2015) (Hartz, J., dissenting from denial of rehearing en banc).

Rather than answer that question, HHS attempts to obscure the true nature of its regulatory scheme and petitioners' RFRA claims, likening petitioners to an impossible-to-please conscientious objector who objects even to "opting out" of the draft because another registrant will take his place. Resp.Br.16. But the whole problem here—and the real source of petitioners' religious objections—is that HHS has *not* allowed petitioners to "opt out." Instead, HHS has reserved a true opt-out—something RFRA guarantees equally to all adherents—to houses of worship, their associations, and their integrated auxiliaries. What HHS offers petitioners instead is not an exemption, or even an opportunity for exemption, but only an alternative means of *compliance*—an alternative under which, by HHS's own telling, petitioners "need" to and "are required to" perform certain actions to help HHS use their plans to provide the objected-to coverage. Resp.Br.12. HHS will deem petitioners in compliance only if they affirmatively facilitate HHS's efforts to identify and obligate (or in some cases incentivize) closely related third parties to ensure that the petitioners' "health plan[s]" "provide coverage" for all FDA-approved contraceptives. 42 U.S.C. 300gg-13(a).

Thus, the proper analogy is not to a conscientious objector truly allowed to opt out of the draft, but to a conscientious objector given two options to comply with a compulsory service obligation: either serve directly or provide the name and whereabouts of a family member or friend to serve in his stead. No one could

seriously characterize that as an "opt-out" or exemption that relieves the substantial burden on his religious exercise.

Indeed, if all HHS wanted was notice that petitioners want to "opt out", this lawsuit would have been unnecessary, as petitioners have no objection to notifying HHS of their intent to take advantage of a true exemption. The problem is that HHS wants something else entirely: It wants petitioners to *comply* with the mandate by handing over to HHS the information, authority, and plan infrastructure it needs to provide the coverage. As HHS itself admits, requiring "objecting employers" to "furnish[] such information" is "necessary" to its efforts to get contraceptive coverage to their employees. Resp.Br.27. And as HHS now concedes—for the first time—"the contraceptive coverage provided by [the] TPA" of a self-insured plan "is * * * part of the same ERISA plan as the coverage provided by the employer." Resp.Br.19. HHS can hardly claim that "the objecting employer plays no role" in facilitating coverage, Resp.Br.20, when HHS itself claims that the employer's forced execution of the requisite form is essential to getting the coverage to flow—and flow as "part of the" employer's own plan. Resp.Br.19.

Nor can HHS deprive petitioners of their RFRA claims by insisting that what petitioners *really* find morally objectionable is "the actions of the government and TPAs * * * that would occur after petitioners" execute the requisite forms. Resp.Br.12-13. There is nothing unusual about a religious objection that stems from the consequences of compelled acts rather than the acts alone. The religious adherent in *Thomas* v. *Review Board*, 450 U.S. 707 (1981), did not object to

fabricating turrets because he found fabricating turrets morally objectionable. He objected because the turrets would be used to construct tanks that third parties would use to engage in warfare. *Id.* at 710. That his religious objection to his own action of making turrets was related to "the actions of [third parties]," Resp.Br.12-13, did not deprive him of the right to object to what he himself was compelled to do.

The situation is no different here. To be sure, petitioners object to complying via the so-called "accommodation" because doing so forces petitioners to facilitate the provision of contraceptive coverage by third parties. If HHS required them to take similar actions with different consequences, they might not object. Executing a form can have very different legal and moral consequences depending on what it authorizes or enables others to do. But although consequences matter, the object of petitioners' RFRA claims remains the actions HHS would compel *them* to take, not the distinct actions of third parties. That makes HHS's reliance on *Bowen* v. *Roy*, 476 U.S. 693 (1986), entirely misplaced. HHS emphasizes *Bowen*'s holding that the religious adherent could not challenge *the government*'s use of a social security number, Resp.Br.15, but it ignores *Bowen*'s holding that he *could* challenge the requirement to furnish that number himself. See 476 U.S. at 701-02 & n.7. That is because the Court recognized the commonsense difference between objecting to the actions of third parties and objecting to an obligation imposed on the religious adherent himself. In treating petitioners' objections to the obligation HHS has imposed on *them* as no different from an objection

to the actions of third parties, it is HHS that impermissibly seeks "to collapse the *legal* distinction between" the two. Resp.Br.15.

Nonetheless, HHS has convinced several courts to do just that. Worse still, it has convinced courts to "address[] a * * * question that the federal courts have no business addressing"—namely, whether "the connection between what the objecting parties must do * * * and the end that they find to be morally wrong" is close enough to violate their religious beliefs. *Hobby Lobby*, 134 S. Ct. at 2777-2778. The Fifth Circuit did not dispute that petitioners are being compelled to do more than merely inform HHS of their objections; it just deemed what HHS demands something less than "facilitating access to contraceptives," Pet.App.18a, notwithstanding petitioners' sincere religious beliefs to the contrary. And the Fifth Circuit is hardly alone in reasoning that employers are simply wrong to believe that the regulatory mechanism "forces [them] to act in a way that would violate [their] beliefs." *University of Notre Dame* v. *Burwell*, 786 F.3d 606, 612 (7th Cir. 2015); see also *Geneva College* v. *Secretary U.S. Dep't of Health & Human Servs.*, 778 F.3d 422, 435 (3d Cir. 2015) ("objectively assess[ing] whether the appellees' compliance with the self-certification procedure does, in fact * * * make them complicit" in facilitating contraceptive coverage).

HHS understandably attempts to distance itself from the actual reasoning of the decisions it has procured, see Resp.Br.14, but that reasoning confirms that second-guessing sincerely held religious beliefs is the inevitable result of HHS's arguments. As this Court has admonished repeatedly, however, "it is not within the judicial function and judicial competence to

inquire whether" a religious adherent has "correctly perceived the commands of [his] faith." *Thomas*, 450 U.S. at 716. Instead, the only question under the substantial burden analysis is whether the government has "demand[ed] that [religious adherents] engage in conduct that seriously violates their religious beliefs" on pain of "substantial economic consequences." *Hobby Lobby*, 134 S. Ct. at 2775, 2776. Just as in *Hobby Lobby*, the answer here is plainly yes. Indeed, it could hardly be otherwise, as both the mandate and the penalties are the same as those in *Hobby Lobby*. That courts have repeatedly refused to recognize as much is proof enough of the pressing need for this Court's intervention.

II. The decision below is as wrong in its ultimate conclusion as in its substantial burden analysis.

This Court's review also is essential because, under a correct application of RFRA, HHS's decision to offer religious nonprofits an alternative to comply does not solve the RFRA problem this Court identified with the contraceptive mandate in *Hobby Lobby*. First, HHS cannot identify a compelling interest in forcing religious nonprofits to comply with the contraceptive mandate. As this Court explained in *Hobby Lobby*, what matters under RFRA is whether HHS's "marginal interest in enforcing the contraceptive mandate" against *religious adherents* is compelling. *Hobby Lobby*, 134 S. Ct. at 2779. HHS can hardly satisfy that demanding standard when it continues to exempt from *any* form of compliance grandfathered plans covering *more than 25%* of employees. Resp.Br.4 n.3. An interest is hardly compelling when it is excused for a quarter of all employees for reasons of administrative

convenience. Failing to honor a religious objection to a requirement that is so commonly waived for secular reasons is a paradigmatic RFRA violation. And it is all the more problematic when HHS is trying to force *some* religious employers to comply with the mandate while automatically exempting others, even though the religious objections are the same.

Nor is the regulatory mechanism the least restrictive means of providing employees of religious nonprofits with cost-free access to contraceptives. HHS has ample means to achieve that end without forcing the subset of disfavored religious nonprofits to facilitate the provision of coverage by their own insurers or TPAs. Pet.33-34. HHS misleadingly suggests that petitioners would object to "*any* system in which their employees gain an entitlement to contraceptive coverage." Resp.Br.22. But HHS's felt need to continue attacking that straw man is explained only by the weakness of its least restrictive means argument. Petitioners have made it crystal clear that they object only to being compelled to *facilitate* the provision of contraceptive coverage to their employees. If HHS wants to provide those benefits itself or through any process that omits petitioners and their plans, it is free to do so.

HHS complains that those options might require it to expend resources. Resp.Br.22. But as this Court already has admonished, "HHS's view that RFRA can never require the Government to spend even a small amount reflects a judgment about the importance of religious liberty that was not shared by the Congress that enacted that law." *Hobby Lobby*, 134 S. Ct. at 2781. HHS alternatively complains that some options may require congressional approval. Resp.Br.23. But

the least restrictive means analysis has never been understood to be limited to those alternatives already authorized by rule or statute. See, *e.g.*, *Holt* v. *Hobbs*, 135 S. Ct. 853, 864 (2015). In all events, HHS is poorly positioned to complain about the need for congressional action when neither the contraceptive mandate nor the exemption for a fortunate few religious organizations was the result of congressional action. Congress never authorized HHS to design an *ad hoc* exemption for some religious organizations but not others; to the contrary, RFRA demands that *all* religious adherents enjoy its protections.

III. This is an ideal vehicle for resolving the question presented.

This is an ideal vehicle for resolving the question presented. The relevant facts are undisputed, and the courts below fully and finally resolved petitioners' RFRA claims. HHS notes that an en banc petition filed by other parties to the decision below remains pending. Resp.Br.28. But those parties' appeals arose from different District Court decisions, and the en banc petition is in any case irrelevant to the question of which petition(s) to grant, as the Fifth Circuit likely will stay its hand upon a grant of certiorari in this case or another.

HHS notes that petitioners have only two of the three types of plans (self-insured and church plans) considered by courts. Resp.Br.28. But neither HHS nor petitioners contend that the validity of the regulatory option turns on the details of an employer's plan. And understandably so, as the obligation HHS imposes on employers remains the same no matter the plan. In each instance, HHS deems an employer in

compliance only if it executes one of the forms allowing use of the employer's plan infrastructure. In each instance, HHS asserts the same interest in requiring the employer to execute that form. And in each instance, HHS has available all the same alternative means of ensuring provision of cost-free contraceptive coverage without demanding employer involvement. Thus, both HHS's excursion into the details of different plans and its observation that this petition features two of the three plan types are beside the point.

Yet should the Court prefer to consider all three plan types, it can grant this petition in combination with one involving an insured plan, or grant both petitions pending out of a decision that addresses all three plan types, such as the two petitions out of the *Little Sisters* decision. See *Little Sisters of the Poor Home for the Aged* v. *Burwell*, No. 15-105 (filed July 23, 2015); *Southern Nazarene Univ.* v. *Burwell*, No. 15-119 (filed July 27, 2015).*

Finally, that the Fifth Circuit did not reach the compelling interest or least restrictive means analysis is no obstacle to review. The District Court reached those issues in entering a permanent injunction against HHS, so they were fully developed and briefed in both courts below. (Indeed, the issues were more fully developed than in the D.C. Circuit cases, where most plaintiffs lost in District Court and those issues were addressed principally in supplemental briefing

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* The *Little Sisters* petition is also the only one that squarely presents another important and closely related question—namely, whether HHS may pick and choose which religious organizations warrant exemption from its mandate.

on appeal.) And HHS remains free to defend the judgment on those alternative grounds. Thus, this petition and its broadly framed question presented give the Court the option of definitively resolving the mandate issue or correcting the mistaken substantial burden analysis and remanding. But the most important thing is not which petition(s) the Court grants, but that the Court grants review of the exceptionally important question presented now, before it is too late to save religious nonprofits from the impossible choice that HHS has unnecessarily thrust upon them.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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